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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 948

WILLIAM H. FITZPATRICK,
Petitioner,

vs.

W. NIERSTHEIMER, WARDEN, etc.,
Respondent.

WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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14 (61780—60)

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The respondent, for this his answer to the petitioner's petition for writ of certiorari in the premises, says that, for the reasons and upon the considerations suggested in the brief accompanying this answer, the said petition for writ of certiorari should be denied.

More particularly, this respondent says:

1. Insofar as the petitioner's petition for writ of habeas corpus in the Supreme Court of Illinois charged

that the petitioner was denied an opportunity to present substantial evidence in his behalf, either because of the alleged incompetence of his counsel or because of the alleged failure of the court to grant him sufficient time and afford him the means of procuring evidence of his innocence, the petitioner had a plain, speedy, adequate and complete remedy by the law of Illinois, either upon writ of error with respect to such part of his claims as appeared of record or by the statutory substitute for the writ of *coram nobis* afforded by section 72 of the Illinois Civil Practice Act. (Chap. 110, Par. 196, Ill. Rev. Stats. 1939)

2. Insofar as the petitioner claims to have been deprived of due process of law under the Fourteenth Amendment by being taken, so he says, to the penitentiary within six days after the court had granted a thirty-day stay of the mittimus, the respondent says that there is no denial of due process under the facts alleged in petitioner's petition in this regard which would have entitled him to a discharge in the habeas corpus proceedings filed by him in the Supreme Court of Illinois.

The assertion by the petitioner that a thirty day stay was granted and that he was taken to the penitentiary six days after such stay was granted is not supported by any trial record included in the petition which the petitioner filed in the Supreme Court of the State of Illinois.

3. Insofar as the petitioner sought the writ of habeas corpus on the alleged ground that he had been unlawfully

denied a hearing by the Illinois Parole Board, petitioner's claim was not to the right of discharge from incarceration, which is the sole right that can be ascertained by habeas corpus, but was to the right of due process of law by proper and adequate hearing, which right could not be enforced by habeas corpus but only by the writ of mandamus, which has at all times been available and is still available to the petitioner in the premises.

WHEREFORE, the respondent prays that the present petition for writ of certiorari be denied.

W. NIERSTHEIMER, Warden,
Illinois State Penitentiary,
Menard Branch, Menard, Illinois.

By GEORGE F. BARRETT,
Attorney General of the State
of Illinois.

STATEMENT THAT THERE IS NO OFFICIAL REPORT OF ANY OPINION DELIVERED OR JUDGMENT RENDERED BY THE COURT BELOW.

The Supreme Court of Illinois rendered no opinion in this case. The judgment, rendered March 23, 1944 (*Petition*, p. 30), has not been officially reported.

STATEMENT OF THE CASE

For the assistance of the court in its consideration of this application, the Attorney General of Illinois has caused to be prepared and submitted to this court a transcript of the complete record of the Supreme Court of Illinois in the proceeding of which the petitioner now seeks review.

On February 18, 1944, petitioner filed *pro se* in the Supreme Court of Illinois his original petition for habeas corpus, by which petition he sought to be released from confinement in the Illinois State Penitentiary, Menard Division at Chester, Illinois, the Warden of that penitentiary being made respondent to the petition.

It appears from the petition that petitioner was convicted in the Criminal Court of Cook County of the crime of robbery while armed (Ill. Rev. Stats. 1939, Ch. 38, par. 501). His present confinement is pursuant to this conviction and the judgment entered thereon by the court.

Petitioner asserted that he was entitled to his discharge upon the following grounds:

The petition narrated in minutely circumstantial detail the petitioner's claim that he was confined in the Cook County jail upon an indictment "returned in October 1940" charging him with the offense in question that he was "ar-

raigned about the middle of the same month" that the public defender was appointed to represent him, and that a plea of not guilty was entered (Pet. p. 13). (The public defender in Cook County, Illinois is a public official who holds his office by provision of statutes. (Ill. Rev. Stats. 1939, Ch. 34, par. 163(c), *et seq.*))

According to the averments of the petition, three members of the staff of the public defender called upon him successively, and to each of them he protested his innocence and refused to plead guilty. (Pet. p. 3-5)

Subsequently, according to the averments of his petition, on January 7, 1940, his case was regularly called for trial and his motion for a continuance was denied by the court. (Pet. p. 14) From the averments of his petition it appears that from between the "middle of October 1940" to the date of his trial, "January 7, 1941" the People had sought and obtained from the court two continuances of the cause. (Pet. p. 4 and 13) Acording to the averments of his petition the defense which he interposed at the trial was that of an alibi. He contended that he stayed or roomed at the Y.M.C.A. He says that on the night the supposed crime was committed he was actually in his room. (Pet. p. 5)

The case was tried before a jury which rendered a verdict finding him guilty of robbery while armed as charged in the indictment. (Pet. p. 5) The following day he was brought before the court and sentenced to the Illinois State Penitentiary as is provided by the laws of Illinois (Ill. Rev. Stats. Ch. 38, par. 801, *et seq*) for an indeterminate sentence of from one year to life. (Pet. p. 5) According to the averments of his petition the public defender filed a motion for a new trial in his behalf, which motion was denied by the trial court. (Pet. p. 5)

It is further asserted in the petition that the petitioner sought and obtained a thirty day stay of mittimus so that a bill of exceptions could be prepared and filed by the public defender in order that he might perfect an appeal to the Illinois Supreme Court. He says that the public defender promised to have such bill of exceptions prepared (Pet. p. 5-6) He asserts that by reason of the fact that he was removed to the penitentiary six days after the thirty day stay was granted to him that he was deprived of due process of law under the Fourteenth Amendment and by reason thereby was entitled to his discharge by the Illinois Supreme Court on the writ of habeas corpus filed by him in that court.

The petitioner makes the claim that he importuned both his counsel and the trial court for a continuance, so that he might procure witnesses, whose names or other identification he has never specified, to corroborate his claim of an *alibi*. Petitioner further leaves the inference that if his case had been continued an indefinite length of time, he would or might have been able to procure funds, the extent of which is not shown, with which to continue his defense. He does not show or suggest what exertions he could have made by the use of such funds, had the court acceded to his request, that were not made by the public defender.

It is not alleged, or even intimated, that the public defender did not, in pursuance of his statutory duty, go to the Y. M. C. A. and search for persons, un-named by petitioner, who might remember petitioner's presence there on the night of the robbery and might substantiate his alibi.

Petitioner first received notice of his mother's death by telegram dated October 19, 1940, (Pet. p. 32) and first received notice that he was a beneficiary under her will by

letter from her attorney in New York dated October 22, 1940. (Pet. p. 32-33) Petitioner alleges that he was tried January 7, 1941. The Court will, of course, take judicial notice that estates are seldom liquidated in less than a year in any jurisdiction.

The petitioner also contends, setting forth his claim with a particularity which it is unnecessary to repeat in this statement, that he has been unlawfully confined in the Psychiatric Division of the Penitentiary (Ill. Rev. Stats. 1939, Chap. 108, Par. 111), and that the Parole Board, without lawful authority, has refused to grant him a hearing before the Parole Board in accordance with the Rules and Regulations of the Board, promulgated by authority of statute (Ill. Rev. Stats. 1939, Chap. 38, Par. 807).

Suffice it to say in this connection that it will be shown in the argument that in so far as petitioner does not claim any preemptory right to his discharge, but merely a right to a hearing, the writ of habeas corpus is wholly and completely inappropriate, the proper mode of enforcing a right to a hearing, and not an absolute right to present freedom, being, of course, by the writ of *mandamus*.

ARGUMENT

Petitioner has shown no right to be discharged because of any facts or matter occurring prior to the inception of his imprisonment.

I.

The petition for a writ of habeas corpus, although couched in terms which suggest an inference that the trial court outrageously imposed upon petitioner by denying him a continuance, when analyzed in regard to its content and without regard to the highly emotional tone with which it is surcharged etc., does not allege or even substantially intimate that petitioner was denied either adequate legal counsel or reasonable time or reasonable means for procuring and presenting evidence of his innocence, if any such evidence existed.

All that petitioner says is that the public defender, a public officer whose office is created by the laws of Illinois (Illinois Revised Statutes 1939, Ch. 34, Par. 163(c), *et seq.*) was appointed to defend him; that members of the public defender's staff interviewed him in the jail, months before his trial and were fully apprised of his claim of innocence and of his claim that he was at the Y. M. C. A. at the time of the robbery. It is clear that his counsel had every means at their disposal to make the very simple investigation which entailed only the necessity of going to the Y. M. C. A. and interviewing as many of its *habitués* as possible with a view to discovering whether any of them would remember petitioner's presence there at the time of the robbery.

We earnestly emphasize the following obvious and, we believe cogent considerations:

The petitioner has not made any claim that would not be available to many thousands of prisoners now in confinement. He has asserted only that other counsel "*might*" have found some witness who would exonerate him had he been given a continuance for an indefinite time. According to his own narrative, the lawyer who was "most familiar" with his case was present to assist the man whom he designates as "counsel No. 3".

There was no showing of likelihood or even substantial probability that a continuance, however long, would have enabled him to find evidence to corroborate his story.

To hold that the averments in the present petition entitle the petitioner, as a matter of Federal constitutional right, to an absolute discharge from custody (unless they are contradicted in point of fact) is to hold that every time counsel is appointed for a defendant without funds, such a defendant may claim that an indefinite continuance will or may enable him to procure counsel who will or may discover some unnamed witness who will or may exonerate him; and that thereupon, unless the court acceeds to such a request, the peitioner is *ipo facto* deprived of due process of law and entitled to his freedom under the pronouncement of the Supreme Court of the United States.

Thus far, we have confined our argument to the intrinsic merits of petitioner's claim without regard to the important question whether the instant proceeding and the present forum are appropriate for the assertion of that claim.

However, it is instantly apparent that even if petitioner's claim that denial of an indefinite continuance amounted to denial of due process, neither original petition to the Supreme Court of Illinois nor certiorari from this court is the proper mode of asserting this claim.

This court's recent decision in *Ex Parte Hawk*,—U.S.—64 Sup. Ct. 448, is in point and is decisive.

There, as here, the petitioner contended that he was, in this court's language, "forced into trial—with such expedition as to deprive him of the effective assitance of counsel." (In addition, in the *Hawk* case, petitioner's claim was reinforced by the considerations, not present in the instant case, (1) that the offense was capital and (2) that the petition was based on evidence known by the prosecution to be false.)

This court there pointed out that in Nebraska, as in Illinois, (1) the jurisdiction of the Supreme Court is extraordinary, (Ill.Con. Art. VI., Sec. 2) (*People* v. *Simon*, 284 Ill. 28) the court of general jurisdiction in the county being the only court in which a prisoner has an absolute right to a writ of habeas corpus in a proper case, and (2) the writ of error *coram nobis* (or a statutory substitute therefore) was available and appropriate.

In Illinois, the writ of error *coram nobis* has been supsupplanted by a statutory proceeding of equivalent office. (Ill. Rev. Stats. 1939, 1941, 1943, Ch. 110, par. 196.) This remedy extends to criminal cases where, through excusable mistake, the accused has not had an opportunity to present matter that would prevent the entry of judgment. (*People* v. *Bruno*, 346 Ill. 449; *People* v. *Ogbin*, 368 Ill. 173.)

The distinction between *coram nobis* in the trial court and *habeas corpus* in the Supreme Court is not a merely technical one or a difference only in nomenclature. The consequences are very different. On *coram nobis*, the case comes before the court that entered the judgment. On *habeas corpus*, the Supreme Court is asked to interfere with a court which, although inferior in the general judicial

hierarchy, has concurrent jurisdiction, of equal dignity with the Supreme Court, in original proceedings where the Supreme Court has jurisdiction at all.

Nor is this a suggestion of the mere amenities of comity. When a judgment is inquired into on *coram nobis*, if the judgment is vacated, the prisoner remains subject to the jurisdiction of the court, on bail or in custody, to await trial in due course, since the judgment of conviction has been vacated.

We submit that the petitioner has shown no meritorius ground for discharge upon habeas corpus, and that, even if he had (as was the situation in the *Hawk case* if petitioner's claim of perjury was true), he has not exhausted plain, adequate and efficient remedies available under the laws of Illinois.

II.

Petitioner's contention that he was taken from Cook County to the penitentiary six days from the date of granting a thirty-day stay of mittimus.

The petitioner contends under this point that the Court (we assume he means the trial court) "lost jurisdiction when it committed petitioner to the penitentiary after six days elapsed from the time a thirty day stay in the execution of sentence had been granted". (Pet. p. 7.) On page 22 of the petitioner's petition he refers to certain sections of the Illinois Statutes as authority for such assertion. The section referred to is, Section 12, Division XV of the Criminal Code of the State of Illinois (Ill. Rev. Stats. 1939, Ch. 38, Par. 780). An examination of that section of the Statute discloses it was enacted for the purpose of allowing a prisoner who had been convicted to obtain a stay of execution so that he might secure a supersedeas in the Courts of

review, and that if a supersedeas was granted his bail could be fixed and determined in such Court, pending a hearing of the cause before that Court.

Under the Illinois law an appeal or writ of error does not stay the execution of the sentence as a matter of right. (*People* v. *Cowdrey*, 278 Ill. App. 65-67.)

The assertion contained in petitioner's petition filed with the Supreme Court of the State of Illinois contains no trial court record which would even remotely tend to prove his claim that he was in fact granted a stay of mittimus by the trial court. The assertion that such stay was in fact granted rests upon the statement of the petitioner alone.

He made no showing before the trial court even by the averments of his petition filed in the Illinois Supreme Court and before this Court that he intended to apply for a supersedeas or to obtain bail. The fact that he remained continuously incarcerated in the county jail of Cook county from the middle of October, 1940 to and including the date of his trial on January 7, 1941, tends strongly to contradict any supposition that he could or might obtain bail during the pendency of an appeal.

Even if we assume the averments of the petition filed by the petitioner to be true, namely, that he was taken to the penitentiary six days after the sentence was imposed upon him, and six days after the supposed stay of execution had been granted him, we are unable to perceive, how or in what manner he was denied his right of appeal to courts of review of this State.

We submit there is no merit to petitioner's contention in this regard.

III.

No substantial issue of due process is raised by petitioner's claim that he was denied the right of appeal or writ of error.

The petitioner asserts that he was denied due process of law because he was not afforded review by appeal or writ of error. By the Statutes of the State of Illinois (Ill. Rev. Stats. 1939, Ch. 38, Par. 771) a writ of error in criminal cases is a writ of right, and may be sued out at any time within twenty years after the conviction. (*People* v. *Murphy*, 296 Ill. 532.)

Under the Illinois Statutes creating the office of Public Defender in Cook County, Illinois (Ill. Rev. Stats. 1939, Ch. 34, Par. 163c) the public defender, is a public official as we have pointed out above. He is given the authority to prosecute appeals at the expense of the county under certain circumstances (Ill. Rev. Stats. 1939, Ch. 34, Par. 163f). He is only required to "prosecute any writ of error or other proceeding in review which in his judgment the interest of justice require."

Under the laws of Illinois all errors relied upon for reversal not appearing in the common law record, must be presented to the Courts of review in criminal cases by bill of exceptions signed and settled within the time provided by Statute. (Rule 70A Supreme Court of Illinois; Ill. Rev. Stats., 1939, Chap. 110, Par. 259, 70A)

There is no absolute right to appeal in this State without the payment of costs except in capital cases. In the present case a duly appointed public official (Public Defender), apparently did not believe that justice demanded an appeal from the judgment of conviction of the trial court.

In this case no showing was made of record or averred in the petition filed in the Illinois Supreme Court or in this Court that the petitioner sought to have the bill of exceptions prepared at the expense of the County (Ill. Rev. Stats. 1939, Chap. 53, Par. 80) or that he applied to a Court of Review for leave to prosecute such appeal without costs.

This Court has held that the right of appeal is not essential to due process. (*Lott* v. *Pittman*, 243 U. S. 588-591.) It was likewise held in that case that it is "competent for the State to prescribe procedure and conditions", under which an appeal or writ of error is allowable.

Illinois has never guaranteed and does not guarantee to furnish any prisoner (except in capital cases) with a right of review at public expense.

To sustain petitioner's contention in this regard would free every prisoner in every State penitentiary who does not have a transcript of testimony or bill of exceptions and who has not been assigned counsel under compulsion to prosecute an appeal for him.

IV.

Petitioner's claim that he has been denied a hearing by the Parole Board is not upon any theory appropriately asserted in a habeas corpus proceeding.

The petitioner asserts in his petition, in substance, that under the applicable statutes of the State of Illinois (Ill. Rev. Stats. 1939, Ch. 38, Par. 801, *et seq.*.) and pursuant to the rules and regulations promulgated by the Parole Board of the State of Illinois, he became and was entitled to a hearing before the Parole Board to determine whether or not he was eligible for parole.

this contention,

In order to demonstrate the fallacy o er in which sen-
it is imperative to briefly outline the man ons convicted of
tences are imposed by the courts upon per egislature dele-
criminal offenses, and in what manner the ty of carrying
gated to the executive department the q
into effect the sentence imposed by the cou

cted of a felony

Under the laws of Illinois, a person conv Ill. Rev. Stats.
is sentenced to the penitentiary generally enitentiary are
1939, Ch. 108, Par. 107). Divisions of the ublic Welfare,
created by statute, and the Department of unted authority
a department of the State of Illinois, was g of the peniten-
to transfer prisoners confined in one divisio 108, Par. 110).
tiary to another (Ill. Rev. Stats. 1939, Ch. e Penitentiary,
The psychiatric division of the Illinois Sta s a division of
where the petitioner is presently confined, le persons may
that penitentiary, where certain types of m ar. 111).
be confined (Ill. Rev. Stats. 1939, Ch. 108, I

It is clear from these provisions of the statute that the
Legislature of the State of Illinois granted o the executive
department of the State the power and the uthority to de-
termine how, in what manner, and place, t e sentence im-
posed by the court should be executed.

A sentence for the crime of robbery, whi ch was imposed
upon the petitioner in this case (Ill. Rev. tats. 1939, Ch.
38, Par. 501), is an indeterminate sentence of "not less than
one year or for life". The trial court, in im posing sentence
upon a person convicted of such offense, m ust impose an
indeterminate sentence upon him for that c rime. (*People*
v. *Conners*, 291 Ill. 614). Under the Illinois aw, an indeter-
minate sentence is a certain and definite s ntence for the
maximum term provided by law. (*People* v. *Becker*, 382

Ill. 404, 410; *People* v. *Connors*, 291 Ill. 614, 615.) A convict has no right to demand that he be discharged before the expiration of such maximum term, since the execution of the judgment is fixed in the executive department of the State, and that department alone is given authority, in its discretion to shorten the term of imprisonment. (*People* v. *Connors*, 291 Ill. 614, 615.) It has been held by the highest court of this State that the courts of Illinois will not interfere with the exercise of such discretion by the officers and members of the Parole Board. (*People* v. *Bowen*, 367 Ill. 589, 595.)

In *People* v. *Pace*, 362 Ill. 224, and *People* v. *Rucker*, 364 Ill. 371, it was there said that parole was merely an act of clemency and grace which the defendant could not invoke at his own will. (See also; *People* v. *Thompson*, 381 Ill. 71-72.)

The petitioner contends that he has been deprived of due process under the Fourteenth Amendment by a denial of a hearing before the Parole Board. Since, under the Illinois law, habeas corpus is not the appropriate remedy to compel public officials to perform their duties, if any they owed to the petitioner, it is clear that the petitioner has misconceived his remedy in this respect. He does not point out how, or in what manner, the failure of the Parole Board to grant him a hearing, rendered void the judgment of the trial court, so as to entitle him to a discharge on his writ of habeas corpus filed in the Supreme Court of Illinois.

Since he claims no preemptory or absolute right to freedom on this ground, and since, obviously, he can claim none, his remedy, if he has been denied a hearing, is by *mandamus*. The writ of mandamus lies in Illinois to compel public officials to discharge their duties. (*People* v. *Lyons*, 374 Ill. 557; *People* v. *Nelson*, 349 Ill. 193.)

CONCLUSION

For the foregoing reasons, respondent submits that the application for certiorari should be denied.

Respectfully submitted,

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